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IN THE

Supreme Court of the United States

October Term, 1941.
No. 639.

AUSTIN CORCORAN,

Petitioner,

vs.

MONTGOMERY WARD & COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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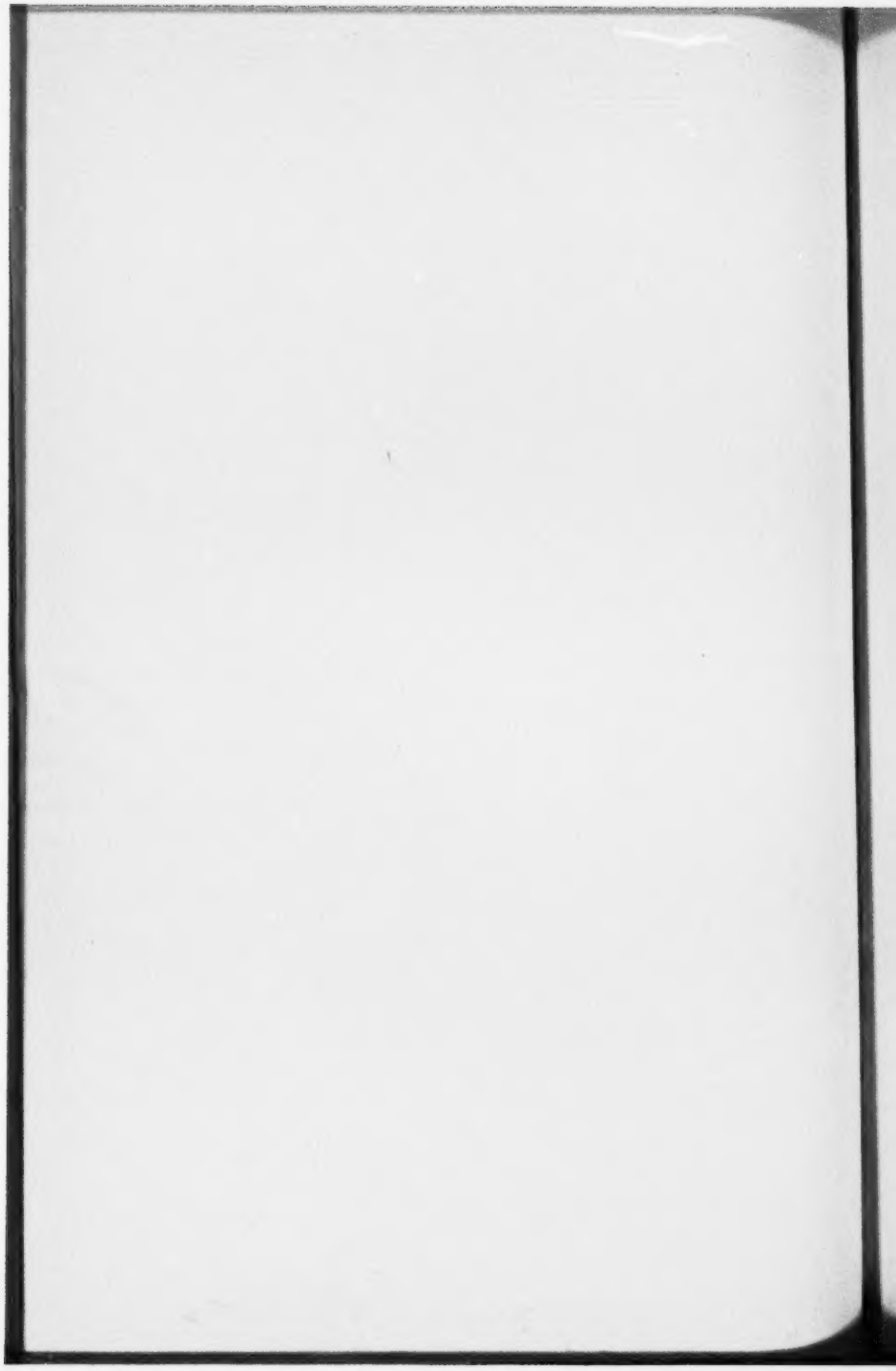

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Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit [R. 62-66], upon appeal in *forma pauperis* allowed by that Court, Mathews, C. J. dissenting [R. 59], is reported in 121 Fed. (2d) 572.

The opinion of the Circuit Court of Appeals was rendered on June 28, 1941 [R. 61, 66], and a decree was entered on that date affirming the judgment of the District Court in favor of Respondent [R. 67]. No formal opinion was rendered by the District Court but a Memorandum of Conclusions was filed [R. 26-27], reported in 45 U. S. Patent Quarterly 114.

Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code (28 U. S. C. A., Sec. 347).

Questions Involved.

(1) Where an author of a poem copyrights it under the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U. S. C. A., Sec. 1 *et seq.*, as a non-dramatic literary work, *i. e.*, as a contribution to a periodical within the classification of "books" under Section 1(a), does the author acquire any rights under said Copyright Act other than those granted by subsections (a) and (b) of Section 1 of said Act?

(2) Does the Second Amended Complaint [R. 19-24b] state any claim against Respondent upon which relief can be granted?

(3) Does the Record show that Petitioner's poem is in the public domain?

Statutes Involved.

The statute involved is the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075 (17 U. S. C. A., Sec. 1 *et seq.*); Section 1 of said statute will be found in the Appendix, *infra*, pp. 9 to 11.

Statement.

Although Petitioner's statement of the facts and questions presented (Petn. 2-9) is far more inclusive than the Record warrants, Respondent deems it unnecessary to present a restatement here since the opinion of the Court below contains an incisive statement of the facts and issues involved.

Argument.

1. We respectfully submit that the decision of the Circuit Court of Appeals does not involve important questions of federal law requiring settlement by this Court. Nor does that decision respecting phonograph records involve new scientific methods of exploitation of an author's work which were unknown to Congress when the Copyright Act of 1909 was enacted. The mechanical reproduction provisions of subsections (d) and (e) of Section 1 were in 1909 added to the Copyright Act (Act of March 4, 1909, c. 320, 35 Stat. 1075 (17 U. S. C. A., Sec. 1), to give a statutory copyright proprietor of a *dramatic work* or of a *musical composition* the exclusive monopoly of mechanical reproduction or recording rights. These additions were made by Congress because of the decision in *White-Smith Music Publishing Co. v. Apollo Co.,* 1908, 209 U. S. 1, 28 S. Ct. 319; but Congress limited the changes to dramatic works and musical compositions and withheld the grant of similar rights to proprietors of all other copyrighted works, such as poems, books, etc. See Report House Committee on Patents, No. 2222, p. 4, 60th Congress, 2nd Session, Feb. 22, 1909. The opinion of the Court below affirms this fact which is, of course, apparent from the language of the Act itself. To extend by judicial decision at this late date those rights to non-dramatic literary works as Petitioner requests in respect of his poem would be to create by judicial legislation a monopoly where Congress has specifically refused so to legislate.

2. The *quantum* of an author's rights under the Copyright Act with respect to his work depends upon the nature thereof and consequent classification upon registra-

tion, viz.: literary work, drama, musical composition, sermon, etc. (Dewolf, *An Outline of Copyright law* (1925), p. 94; Ladas, *The International Protection of Literary and Artistic Property* (1938), pp. 722-723; *Seltzer v. Sunbrock* (1938), 22 Fed. Supp. 621.) For example, it has been long settled that while an author of a *musical composition* has the monopoly of the right of public performance for profit, he has no monopoly of the right of non-profit public performance. (*Buck, et al. v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 51 S. Ct. 410; *Herbert v. Shanley Co.*, 242 U. S. 591, 37 S. Ct. 232.) On the other hand, the author of a *drama* possesses exclusively both the right of public performance for profit and the right of non-profit public performance (Sec. 1(d)). Petitioner claims he copyrighted his work as a contribution to a periodical, *i. e.*, as a non-dramatic literary work, under the classification of books (Petn. 2); see opinion of Court below, 121 Fed. (2d) 572 at 574 [R. 64-66]. Since the exclusive right to make a mechanical reproduction or recording is granted by Sections 1(d) and 1(e) only to copyright proprietors of dramatic or musical works, Petitioner has no monopoly of such right with respect to his non-dramatic literary work.

3. Petitioner contends that Respondent's manufacture and sale of a phonograph record containing the words of the poem infringed an alleged right of Petitioner to "vend" his work subsisting quite apart from the rights of printing, reprinting, publishing and copying as applied to a non-dramatic literary work. The contention is without

merit and foreclosed by the *White-Smith Publishing Co. v. Apollo Co.* case, *supra;* see the opinion of the Court below, 121 Fed. (2d) 572-3 [R. 62-63], demonstrating that this Court considered in that case whether the acts complained of infringed any right granted by Revised Statutes, Sec. 4952 (33 Stat. 1000-1001), which included, as does Section 1 (a) of the 1909 Act, "printing, reprinting, copying and *vending.*" Necessarily, this Court there rejected the view that the making and selling of player piano rolls infringed any abstract right of "vending" the music there involved apart from a "printing, reprinting or copying." A similar holding respecting the manufacture and sale of phonograph records containing copyrighted musical compositions is to be found in *Stern v. Rosey,* 17 App. D. C. 562. Likewise, Petitioner's contention (Br. 17-18) that the right to make "any other version" contained in Section 1 (b) includes such rights as dramatization, in addition to adaptations and the like, is patently unsound, for any such construction would render wholly unnecessary the specific grant by Congress of the right of dramatization contained in the immediately succeeding sentence of Section 1 (b)—in fact, the enumeration by Congress of the fundamental rights to "print, reprint, publish, and copy" in Section 1 (a) would then represent an idle gesture, for the exercise of any of those would *per se* constitute the making of another version.

4. It is fundamental that a trial court can determine as a matter of law that a literary work does not possess

the characteristics of a "drama" within the meaning of Section 1(b) and 1(d) of the Copyright Act. Petitioner's poem [R. 24a] was incorporated by reference in the Second Amended Complaint [R. 20]. Both the trial court and the Court below properly examined the poem to ascertain whether it conformed with the criteria laid down by adjudicated cases for determining what constitutes a drama or dramatic work; likewise, it was proper to determine from an examination of the poem and the allegations of the pleadings whether Respondent had dramatized the poem. The right of a trial court during consideration of a motion to dismiss to examine the subject matter of a copyright controversy was recognized in *Dezendorf v. Twentieth Century-Fox Film Corporation* (1938), 99 Fed. (2d) 850. What has just been said in response to Petitioner's argument regarding the dramatic characteristics of his poem (Br. 19-22) is equally applicable to his argument that the Court below erred in determining that his poem is not a musical work (Br. 18-19).

5. The Record contains the original complaint filed by Petitioner in this case [R. 1-9]. Respondent contended in the District Court and the Court below that facts alleged in that complaint show that Petitioner's poem entered the public domain prior to the publication in the periodical "WEST" because of a prior publication in an earlier periodical, the Denver Daily Record Stockman, without notice of copyright being affixed [R. 3-4]. Although Petitioner alleged that the insertion of the poem

in the latter publication was pirated [R. 4], his deposit of this periodical in the Copyright Office with an application for registration, which was granted and a certificate issued, constituted a ratification of the allegedly pirated insertion. Moreover, Petitioner commenced an action against Respondent and others for infringement of copyright of said poem based upon that allegedly pirated publication in the Denver Daily Record Stockman; see *Corcoran v. Columbia Broadcasting System, et al.*, 121 Fed. (2d) 575 (C. C. A. 9th, June 30, 1941). Despite the failure of the Court below to comment upon this contention in its opinion, we respectfully submit that the poem is in the public domain.

6. The Petition fails to disclose special or important reasons why the decision of the Court below should be reviewed by this Court and the Record demonstrates that Petitioner possesses no claim against Respondent upon which relief can be granted. The Petition for Writ of Certiorari therefore should be denied.

Respectfully submitted,

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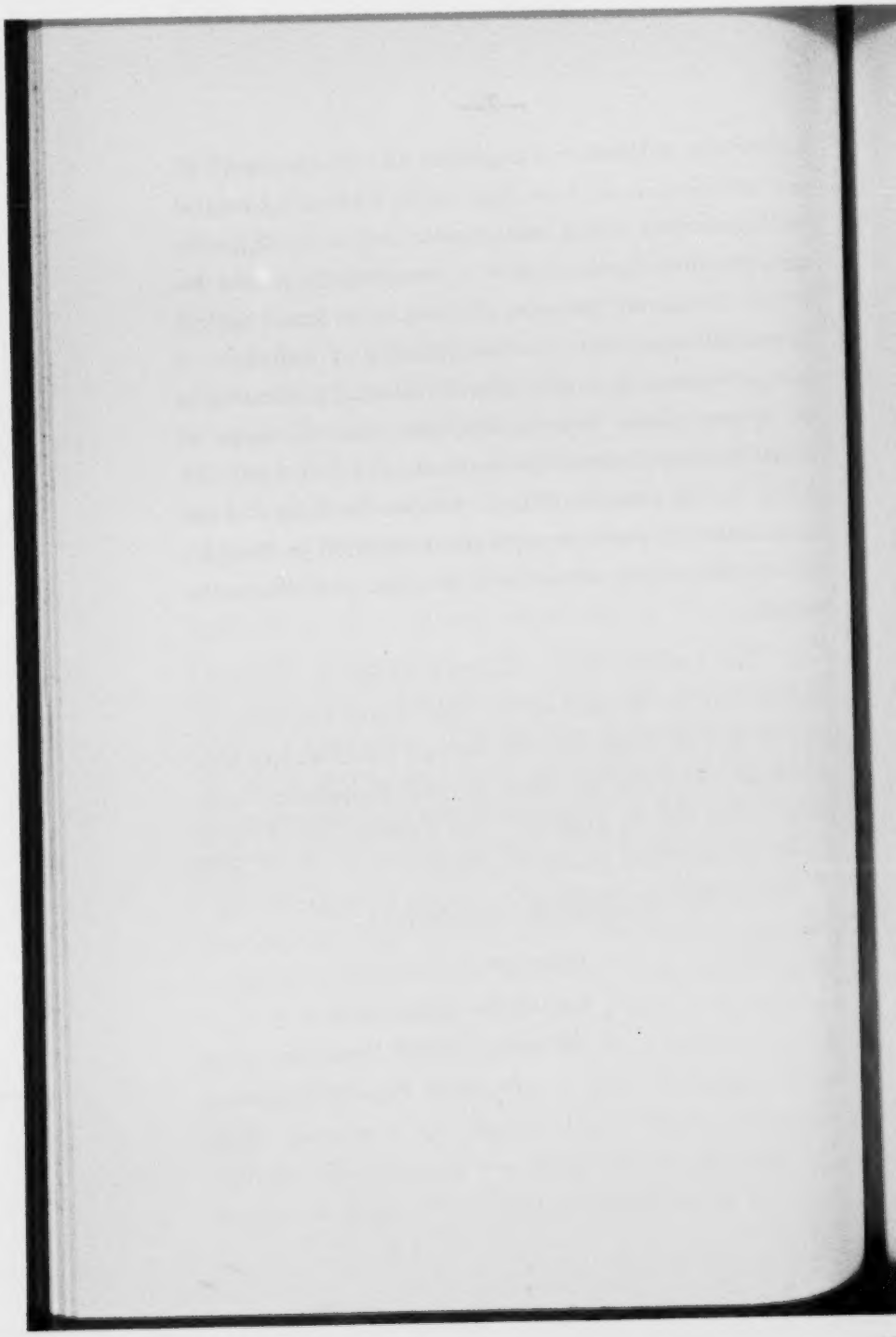

APPENDIX.

Copyright Act.

The Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U. S. C. A., Section 1, reads as follows:

That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided,* That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: *And provided further, and as a condition of extending the copyright control to such mechanical reproductions,* That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any

month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *And provided further,* That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.